

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7287

~~75-7320~~

To be argued by
LOUIS L. STANTON, JR.

**United States Court of Appeals
For the Second Circuit**

Docket No. 75-7320

UNITED BANK LIMITED,
Plaintiff-Appellee,
against
COSMIC INTERNATIONAL, INC.,
Defendant.

JANATA BANK and AMIN JUTE MILLS, LTD.,
Plaintiffs-Appellants,
against
COSMIC INTERNATIONAL, INC. and
IRVING TRUST COMPANY,
Defendants.

[One of consolidated appeals Nos. 75-7287, 75-7320,
75-7325 and 75-7363.]

APPEAL OF THE DISTRICT COURT'S JUDGMENT

**BRIEF OF PLAINTIFF-APPELLEE
UNITED BANK LIMITED**

CARTER, LEDYARD & MILBURN
Attorneys for Plaintiff-Appellee
United Bank Limited
2 Wall Street
New York, New York 10005
(212) 732-3200

LOUIS L. STANTON, JR.
CHESTER J. WROBLESKI
of Counsel

August 7 1975

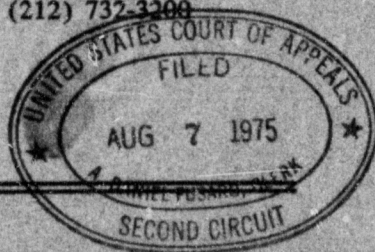


TABLE OF CONTENTS

	PAGE
Statement of Issues for Review	1
Statement of the Case	2
Summary of Argument	6
ARGUMENT:	
I.—The District Court correctly decided that the act of state doctrine is inapplicable to this case	7
A. The act of state doctrine operates only where the acting state has territorial jurisdiction over the interests which it purports to affect ..	7
B. Bangladesh has never had territorial jurisdiction over the property interests at issue in this action	9
C. The Bangladesh plaintiffs' arguments for locating Cosmic's debt in Bangladesh are without merit	11
II.—The District Court correctly decided that the enforceability of the Bangladesh expropriation decrees with respect to property interests located within the United States is a question of United States law	18
III.—The District Court correctly decided that United States public policy precludes recognition of the Bangladesh expropriation decrees, and that therefore United Bank Limited is entitled to the proceeds of the seven Trust Receipts	21
CONCLUSION	26

Table of Authorities

	PAGE
CASES:	
Baglin v. Cusenier Co., 221 U.S. 580 (1911)	9
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)	7, 8
Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), <i>rev'd</i> , 376 U.S. 398 (1964)	24
Bubna More & Co. (Pakistan) Ltd. Chittagong v. Modern Trading Co. (Pakistan) Ltd. Chit- tagong, PLD 1960 Dacca 668	15, 16
Compania Ron Bacardi, S.A. v. Bank of Nova Scotia, 193 F.Supp. 814 (S.D.N.Y. 1961)	9
First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972)	7
Gonzalez v. Industrial Bank (of Cuba), 12 N.Y.2d 33, 186 N.E.2d 410, 234 N.Y.S.2d 210 (<i>per curiam</i> 1962)	21
Hilton v. Guyot, 159 U.S. 113 (1895)	16
Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir.), <i>cert. denied</i> , 409 U.S. 1060 (1972) ..	9, 22
Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), <i>cert. granted sub nom.</i> Alfred Dunhill of London, Inc. v. Republic of Cuba, 416 U.S. 981 (1974)	9, 12, 21
Oliva v. Pan American Life Ins. Co., 448 F.2d 217 (5th Cir. 1971)	9
Pan-American Life Ins. Co. v. Blanco, 362 F.2d 167 (5th Cir. 1966)	9
Perutz v. Bohemian Discount Bank in Liquidation, 304 N.Y. 533, 110 N.E.2d 6 (1953)	21

CASES:—*Continued*

Plesch v. Banque Nationale de la Republique d'Haiti, 273 App. Div. 224, 77 N.Y.S.2d 43 (1st Dept.), <i>aff'd per curiam</i> , 298 N.Y. 573, 81 N.E.2d 106 (1948)	21
Rahmania Trading Co. v. Eagle Star Insurance Co., Ltd., PLD 1960 Supreme Court (Pak.) 202	16
Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), <i>cert. denied</i> , 382 U.S. 1027 (1966)	19, 21, 22, 23
Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), <i>cert. denied</i> , 393 U.S. 924 (1968)	9, 24
Underhill v. Hernandez, 168 U.S. 250 (1897)	7
United States v. Belmont, 301 U.S. 324 (1937)	12
United States v. Pink, 315 U.S. 203 (1942)	12
Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934)	21
Zwack v. Kraus Bros. & Co., 93 F.Supp. 963 (S.D.N.Y. 1950), <i>aff'd</i> , 237 F.2d 255 (2d Cir. 1956)	9

STATUTES:

Bangladesh Code of Civil Procedure (1908)	
Section 20	14
United States Code	
Title 22, Section 2370(e)(1) (1970)	22
United States Constitution	
Amendment V	22, 23

OTHER AUTHORITIES:

Henkin, "Act of State Today: Recollections in Tranquility", 6 Colum. J. Transnat'l L. 175 (1967)	7
Restatement (Second) Foreign Relations Law of the United States (1965):	
Section 43(1)	8
Sections 187-190	22

United States Court of Appeals

For the Second Circuit

Docket No. 75-7320

UNITED BANK LIMITED,
Plaintiff-Appellee,
against

COSMIC INTERNATIONAL, INC.,
Defendant.

JANATA BANK and AMIN JUTE MILLS, LTD.,
Plaintiffs-Appellants,
against

COSMIC INTERNATIONAL, INC. and
IRVING TRUST COMPANY,
Defendants.

[One of consolidated appeals Nos. 75-7287,
75-7320, 75-7325 and 75-7363.]

APPEAL OF THE DISTRICT COURT'S JUDGMENT

BRIEF OF PLAINTIFF-APPELLEE UNITED BANK LIMITED

Statement of Issues for Review

With regard to goods which had been shipped out of
the part of Pakistan which later became Bangladesh, and

had been received and sold in New York before the enactment of expropriation decrees by the new Bangladesh government—

1. Did the District Court correctly decide that the “act of state” doctrine does not require indiscriminate application of the Bangladesh decrees to property in New York?

2. Did the District Court correctly decide that our public policy prevents application of the Bangladesh expropriation decrees, which confiscate Pakistani property without compensation, to property in New York?

Statement of the Case

This case is in the nature of an interpleader action.¹ The issue below was who—the Pakistan plaintiff, or the Bangladesh plaintiffs?—is entitled to funds in the total principal amount of \$433,365.96 which became due between February 8 and May 31, 1972 under the terms of seven Trust Receipts. The District Court (HON. CHARLES L. BRIEANT, JR.) by a memorandum decision dated March 31

¹ Cosmic International Inc. (“Cosmic”) owed funds under the terms of seven Trust Receipts, for which it was sued both by United Bank Limited (of Pakistan) and Janata Bank and Amin Jute Mills, Ltd. (of Bangladesh). The two suits were consolidated on consent, and were tried jointly with a similarly consolidated case (*Sonali Bank v. Irving Trust Company; Nishat Jute Mills, Ltd. v. Cosmic International, Inc.*) involving Cosmic and similar questions but different plaintiffs and funds. In each consolidated case, the Pakistan plaintiffs won and the disappointed Bangladesh plaintiffs are appealing. The appeals (Docket Nos. 75-7287 and 75-7320) were consolidated on consent with two appeals on a single subsidiary issue (Docket Nos. 75-7325 and 75-7363) by the Pakistan plaintiffs which are described in footnote 3, *infra*. This brief, filed on behalf of United Bank Limited, relates only to the above-captioned consolidated case.

1975 (392 F.Supp. 262; JA ² 19) awarded the funds to the Pakistan plaintiff-appellee United Bank Limited.³

Most of the material facts are set forth in a stipulation (JA 46) between United Bank Limited and Janata Bank and Amin Jute Mills, Ltd. (the "Bangladesh plaintiffs"). The facts can be summarized as follows:

THE EXPORT TRANSACTIONS

The significance of December 16 1971 is that it was the date Pakistani troops in East Pakistan (now the People's Republic of Bangladesh) surrendered (JA 52, para. 15).

Prior to December 16 1971, United Bank Limited, a Pakistan bank (JA 46), maintained a branch office in Laldighi East, Chittagong, East Pakistan (the "Chittagong branch") (JA 46, para. 2) through which United Bank Limited had allowed cash credit facilities to Amin Jute Mills, Ltd., secured by a lien on Amin's raw jute, finished goods, stock in process, raw jute and finished goods in transit, and general stores lying in the godowns of Amin at Chittagong (JA 50, para. 7). At all relevant times the amount of Amin Jute Mills, Ltd.'s indebtedness to United Bank Limited far exceeded the total sum in issue in this case (JA 50, para. 7).

² "JA" refers to the Joint Appendix.

³ United Bank Limited has appealed (Docket No. 75-7363) from so much of the District Court's final judgment as fails to grant interest on the sum awarded between the earliest ascertainable date the cause of action existed and the date United Bank Limited filed its complaint. The argument in support of that appeal is contained in a brief filed with this Court by United Bank Limited on July 7 1975. The other Pakistan plaintiff, National Bank of Pakistan, has filed a similar appeal (Docket No. 75-7325) and has adopted the arguments and authorities contained in United Bank Limited's brief.

In seven transactions, Amin Jute Mills, Ltd. exported various quantities of jute and hessian cloth manufactured by it in the territory now known as Bangladesh, to the United States of America, where it was sold to Cosmic as importer for a total purchase price of \$433,365.96 which was to be remitted pursuant to Trust Receipts (JA 50, para. 8; the Trust Receipts are reproduced at JA 124-37) to Irving Trust Company ("Irving") as agent for United Bank Limited (JA 51, para. 10). United Bank Limited issued a letter of transmittal (JA 115-21) to Irving with regard to each Trust Receipt directing Irving to credit the proceeds of the Trust Receipt to United Bank Limited's Karachi (Pakistan) office.

The seven Trust Receipts were executed between August 11 1971 and December 3 1971 and all of the merchandise, bills of lading and documents involved arrived in the United States of America prior to December 16 1971, by which time the merchandise had been resold by Cosmic to purchasers in the United States of America (JA 51, paras. 11-12).

EVENTS IN BANGLADESH

On December 16 1971, Pakistani troops in what is now the People's Republic of Bangladesh surrendered and on or about that date United Bank Limited advised all of its correspondent banks by cable that it had cancelled all authority of the Chittagong branch. By letter dated January 2 1972, United Bank Limited advised all banks in the world of the cancellation of authority (JA 52-3, paras. 15-16).

By the February 28 1972 "Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972" (the "Abandoned Property Order") (JA 74) the

Bangladesh government ordered that all property owned by citizens of a state which was at war with the People's Republic of Bangladesh (namely, Pakistan) at any time after March 25 1971 was "abandoned property", to be vested in the Bangladesh government. No provision was made for payment of compensation to any previous owner of such "abandoned property" (JA 53, para. 17).

By the March 26 1972 "Bangladesh Banks (Nationalisation) Order, 1972" (the "Banks Nationalisation Order") (JA 58) the Bangladesh government ordered that all assets, rights, powers, authorities, privileges and property, books and records, liabilities and obligations of United Bank Limited in Bangladesh immediately before the commencement of the Order were at once transferred to and vested in Janata Bank, a new bank which was created by that Order and whose entire capital was vested in the Bangladesh government (JA 53-4, para. 18).

By the March 26 1972 "Bangladesh Industrial Enterprises (Nationalisation) Order, 1972" (the "Industrial Nationalisation Order") (JA 86) the Bangladesh government ordered that all the shares of Amin Jute Mills, Ltd. which had not already vested in the government under any other law then in force were at once vested in the government as sole shareholder, and its business, affairs and corporate powers were transferred to Bangladesh Jute Mills Corporation, a new corporation which was created by that Order and whose authorized share capital was to be subscribed by the government in the manner determined by the government (JA 54-5, para. 19).

No compensation has been paid under the Banks Nationalisation Order or the Industrial Nationalisation Order (JA 54-5).

THE ASSIGNMENT

By an instrument dated May 22 1973 Amin Jute Mills, Ltd. assigned (JA 122) to United Bank Limited all of its right, title and interest in and to (a) the rights of United Bank Limited and its agents against Cosmic under the Trust Receipts, (b) the jute and hessian cloth and documents and instruments described in the Trust Receipts and the proceeds thereof, and (c) any amounts to which it may be finally adjudged to be entitled in this case.

Summary of Argument

The Bangladesh plaintiffs conceded (JA 51-2, para. 13) and the District Court found (392 F.Supp. at 265; JA 25) that in the normal course of business Irving would have remitted the proceeds of the Trust Receipts to the Karachi, Pakistan office of United Bank Limited. However, the Bangladesh plaintiffs argue that they are entitled to the proceeds under the expropriation decrees promulgated by the Bangladesh government, and that the District Court was required to give effect to those decrees under the act of state doctrine. The Bangladesh parties further argue that even if the act of state doctrine is inapplicable, the District Court was required to enforce the expropriation decrees under American law and the law in effect on the Indian subcontinent.

As demonstrated below, the District Court was correct in deciding that the act of state doctrine has no application to this case, that the enforceability of the expropriation decrees is a question of United States law, that United States public policy precludes recognition of the Bangladesh expropriation decrees, and that United Bank Limited is entitled to the proceeds of the seven Trust Receipts.

ARGUMENT

I.

The District Court correctly decided that the act of state doctrine is inapplicable to this case.

- A. The act of state doctrine operates only where the acting state has territorial jurisdiction over the interests which it purports to affect**

As the District Court noted (392 F.Supp. at 264; JA 21), the classic American statement of the act of state doctrine is found in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The language of *Underhill* has been quoted with approval in two recent Supreme Court cases:

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).⁴

⁴ One commentator has explained the act of state doctrine in the following manner:

"Act of state is a special rule modifying the ordinary rules of conflict of laws. If there were no act of state doctrine, a domestic court in a case like *Sabbatino* would decide it on 'conflicts' principles. It would just decide what law 'governed' the issue. If under accepted choice of law principles the foreign law should govern, the court could still refuse to apply that law if it were found to be contrary to the public policy of the forum. The act of state doctrine, however, says that the foreign 'law' (i.e. the act of state) must govern certain transactions and that no public policy of the forum may stand in the way." Henkin, "Act of State Today: Recollections in Tranquility", 6 Colum. J. Transnat'l L. 175, 178 (1967) (footnote omitted).

The act of state doctrine is a principle of decision binding on state and federal courts alike, whose scope must be determined according to federal law, particularly as enunciated by the Supreme Court. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

The terms of the doctrine as quoted above make it clear that the doctrine operates only where the acting state had territorial jurisdiction over the interests which it purported to affect with its act. The classic example of an act of state not subject to reexamination in the United States courts is the physical seizure of sugar in the *Sabbatino* case itself. Since this act took place in Cuban territory and the jurisdiction of Cuba was demonstrated by the seizure, the Supreme Court found that the title to the sugar vested in the Cuban government by their expropriation decree and by the seizure, and the government's title could not be questioned in the courts of the United States despite the clear violation of United States public policy.

The definite limit to the act of state doctrine is expressed in *Restatement (Second) Foreign Relations Law of the United States*:

“§ 43. Act of Foreign State Affecting Interests Outside Its Territory

(1) [The act of state doctrine] does not prevent examination of the validity of an act of a foreign state with respect to a thing located, or an interest localized, outside of its territory if the act has not been fully executed in accordance with applicable law.” *Restatement (Second) Foreign Relations Law of the United States* § 43 (1) (1965).

The territorial limit on the power to expropriate has been recognized in all the American cases. Foreign ex-

propriation decrees have been uniformly denied effect with respect to property within the United States at the time of the purported takings. See, e.g., *Baglin v. Cusenier Co.*, 221 U.S. 580 (1911); *Pan-American Life Ins. Co. v. Blanco*, 362 F.2d 167 (5th Cir. 1966); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968); *Oliva v. Pan American Life Ins. Co.*, 448 F.2d 217 (5th Cir. 1971); *Maltina Corp. v. Cawby Bottling Co.*, 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972); *Zwack v. Kraus Bros. & Co.*, 93 F.Supp. 963 (S.D.N.Y. 1950), *aff'd*, 237 F.2d 255 (2d Cir. 1956); *Compania Ron Bacardi, S.A. v. Bank of Nova Scotia*, 193 F.Supp. 814 (S.D.N.Y. 1961).

B. Bangladesh has never had territorial jurisdiction over the property interests at issue in this action

The operation of the act of state doctrine depends on the location of the property which is purportedly seized. The Bangladesh parties conceded (JA 51, paras. 11-12) and the District Court found (392 F.Supp. at 265; JA 25) that all of the merchandise covered by the Trust Receipts, the bills of lading and related documents arrived in the United States prior to December 16 1971, and that the merchandise had been resold by Cosmic to purchasers in the United States prior to its arrival. An act of state of Bangladesh does not control an obligation of Cosmic to pay Irving as agent under the Trust Receipts.

The latest statement by this Court on the situs of intangibles for purposes of the act of state doctrine is found in *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *cert. granted sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 416 U.S. 981 (1974). *Menendez* involved cigars exported from Cuba to the United States both immediately before and immediately after several

Cuban tobacco companies became subject to "intervention" (i.e., nationalization) orders of the Cuban government. The proprietors of the cigar companies fled to the United States where they sued a group of importers for the purchase price of the cigars. The Cuban government's interventors, the officials who took control of the cigar companies, intervened in the suits claiming the proceeds under the authority of the intervention orders. With regard to the proceeds of the sale of cigars which left Cuba before the intervention orders became effective, this Court stated:

"[The] act of state doctrine, which applies to a foreign state's seizure of property located within its territory, does not protect a foreign state's attempted seizure of debts owed by persons outside of the foreign state's territory. For purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it. We concluded in *Republic of Iraq* that we will not give legal effect to a foreign state's confiscation, without compensation, of obligations which it cannot enforce on its own if the seizure is inconsistent with the laws and public policy of New York." 485 F.2d at 1364 (footnote omitted).

It is clear that the situs of the obligation of Cosmic to pay for the merchandise covered by the Trust Receipts is in the United States. Cosmic is a Delaware corporation whose principal place of business is now in Georgia but was in New York at the time of the transactions which are the subject of this dispute (JA 47, para. 4), and which had no office or assets in Bangladesh (JA 49).

Thus, the District Court correctly concluded that the act of state doctrine has no application to this case:

"[I]t is clear the sales transactions were complete and all that remained was the right to receive payment, which was to be made in New York City. This right existed before December 16, 1971, the date the new Bangladesh government gained control of East Pakistan. The act of state doctrine is inapplicable because the situs of the debts was New York at the time the Bangladesh government attempted to seize them." 392 F.Supp. at 265; JA 26.

"We have already held that the debt was located in New York at the time the Bangladesh government attempted to seize it. This determination is dispositive, because [*Menendez, supra*, at 1361, fn. 4]:

'The act of state doctrine has never been applied to attempted seizures by a foreign state of property located outside of its territory.'" 392 F.Supp. at 267; JA 30.

C. The Bangladesh plaintiffs' arguments for locating Cosmic's debt in Bangladesh are without merit

The Bangladesh plaintiffs argue that the debt of Cosmic is or was located in Bangladesh because "the creditors are there" (Br⁵ 14), because "the courts [in Bangladesh] have jurisdiction to enforce it" (Br 19), and because it was "an incident to the secured debt between the jute mills and the banks which was itself located in Bangladesh" (Br 33). Then, the Bangladesh plaintiffs contend that the act of state doctrine ought to be amended to provide that "... our courts will not sit in judgment of the taking ... of any intangible property by a foreign

⁵ "Br" refers to the Bangladesh plaintiffs' brief.

state where that foreign state has a reasonable relationship to that taking." (Br 36). None of these contentions has merit. Taking them separately—

(a) "*the creditors are there [in Bangladesh]*"

The Bangladesh plaintiffs rely on *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942) in support of their contention that a debt is located where the creditor is located. These cases are not in point, for they involved decrees of the Soviet government against the property of Russian nationals, not of foreigners, and the decrees were given effect pursuant to the Litvinov Assignment which has no parallel in this case. This Court has specifically rejected the contention that the situs of a debt for purposes of the act of state doctrine is where the creditor, rather than the debtor, is located. *Menendez v. Saks & Co.*, 485 F.2d at 1365.

Equally fundamentally, in this case the creditors are not in Bangladesh. Cosmic's debt was payable to Irving (which is in New York) as agent for United Bank Limited (which is in Pakistan). While the Bangladesh plaintiffs urged at trial that the Chittagong branch office of United Bank Limited was a "creditor" in Bangladesh, the contention that it was a separate entity was firmly rejected by the District Court (392 F.Supp. at 268; JA 35) and we understand it is not urged on this appeal.

(b) "*the courts [in Bangladesh] have jurisdiction to enforce [the debt]*"

The significance of this proposition, in the eyes of the Bangladesh plaintiffs, rests upon an inference from the following *dicta* in *Menendez v. Saks & Co.*:

"For purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that

state has the power to enforce or collect it." 485 F.2d at 1364.

"In the absence of any showing that the importers or their agents were present in Cuba or subject to the jurisdiction of Cuban courts at the time of the intervention [i.e., nationalization], we are persuaded by the reasoning of *Republic of Iraq* that no legal effect should be accorded to Cuba's purported confiscation of the importers' debts to the owners." 485 F.2d at 1365.

The Bangladesh plaintiffs suggest (Br 19-20) that the words about presence in Cuba or subjection to its jurisdiction imply that they can reverse the *Menendez* result by establishing a theoretical basis of jurisdiction over Cosmic in Bangladesh.

The District Court rejected that suggestion and adhered to the well-established rule:

"The facts in *Menendez* do not differ in any significant way from the facts of this case; the principles are the same whether Cuba or Bangladesh is the confiscating country. In *Menendez*, the Court specifically held that the situs of the debt is where the debtor may be found (485 F.2d at 1365), and the Court did not indicate that its decision would have been different or in what way it would have been different if the importers had been subject to the jurisdiction of the Cuban courts.

We do not believe that by these isolated statements, the Court intended to overturn a rule firmly embedded in American jurisprudence at least since *Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1904). We reject the suggestion that, based

on speculation about the result in a case that might have been brought in Bangladesh but was not, this Court should take a position at odds with long-established American precedent." 392 F.Supp. at 269; JA 36.

We leave aside the dubious proposition that the recognized rule would be altered if there were to be some jurisdiction "in the air" but unexercised, according to the Bangladesh concept. The proposition itself hardly arises, for doubts abound that there would be any respectable jurisdiction in Bangladesh over Cosmic.

No suit has in fact been brought against Cosmic in Bangladesh (JA 325). The only authority Bangladesh witnesses offered for their contention that suit might be brought against Cosmic for the purchase price of the goods in the courts of Bangladesh was the text of Section 20 of the Bangladesh Code of Civil Procedure (1908) (JA 309-11, 324). That provides:

"Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not

reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.”

The section basically deals with venue; it is not a section which confers jurisdiction (JA 343-44).

The Bangladesh plaintiffs argued that the Bangladesh courts would have jurisdiction over Cosmic because the cause of action for the price of the goods arose in part, in Bangladesh.⁶ The error is demonstrated by *Bubna More & Co. (Pakistan) Ltd. Chittagong v. Modern Trading Co. (Pakistan) Ltd. Chittagong*, PLD 1960 Dacca 668, reproduced at JA 407. That case establishes that a foreign corporation cannot be sued in Bangladesh when it has no place of residence there, even if part of the cause of action arose in Bangladesh (JA 330-31, 407). Where the foreign corporation has shipped goods into the forum country, as the foreign defendant did in *Bubna More*, it might well be asserted that part of the cause of action arose there. Nevertheless, the court held that it could not exercise jurisdiction over the foreign defendant, because it did not carry on business or reside in Bangladesh. 1960 PLD Dacca, 671; JA 410. The case cannot be dismissed as turning on the failure to serve the foreign defendant. (Br 22-23.) The discussion of the basis for jurisdiction takes up three pages of the report of the case while the failure of service is clearly an alternative ground which only receives two sentences of discussion.

In the latest statement of the highest court of Pakistan on the subject (JA 326-27), *Rahmania Trading Co. v. Eagle*

⁶ An argument was also attempted that Cosmic had not affirmatively refused to submit to Bangladesh jurisdiction (JA 310-11). Cosmic can hardly be considered to have acquiesced in the exercise of jurisdiction by the Bangladesh courts before those courts have taken any steps to exercise such jurisdiction.

Star Insurance Co., Ltd., PLD 1960 Supreme Court (Pak.) 202 (reproduced at JA 403), it left open the question whether a foreign corporation might be sued where all or part of the cause of action arose, but where the corporation has no office. PLD 1960 Supreme Court (Pakistan), at 204; JA 405. This leaves in effect the *Bubna More* decision, *supra*, under which a court in Bangladesh would have to find that Cosmic could not be sued in Bangladesh (JA 340).

The Bangladesh plaintiffs devote considerable discussion (Br 24-33) to the effect any judgment of a Bangladesh Court would have here. It is mere speculation, removed from any useful application to this case. Under *Hilton v. Guyot*, 159 U.S. 113 (1895) (cited at Br 25-26), a preliminary requirement would be that the foreign trial was full and fair, with jurisdiction and without misbehavior in obtaining the judgment. There is no such trial record here, for there was no foreign court proceeding. It is entirely unknown what a Bangladesh court would decide if the case were presented to it. At the outset, it might decide it had no jurisdiction, since a judgment against a foreigner *in absentia* would be an absolute nullity (JA 330, 407). It might well hold that Cosmic's debt was beyond the reach of the nationalizing statutes, since the Bangladesh expert tendered no authority beyond his own reading of the statute for his view that they cover the claim (JA 314-15). In any event, it would apparently give effect to the jurisdiction and judgment of the United States courts in this case (JA 314).

- (c) "*The debt of Cosmic was located in Bangladesh as an incident to the secured debt between the jute mills and the banks which was itself located in Bangladesh*"

The fallacies in this argument, raised for the first time on this appeal, can be briefly enumerated:

- (1) The jute "mills" as such had no debt. The Pakistan corporation which operated a jute mill in

East Pakistan (Amin Jute Mills, Ltd.) owed money to United Bank Limited, another Pakistan corporation.

(2) Although the advance was made by a branch office in East Pakistan, now Bangladesh, it does not follow that the debt was in Bangladesh. As the District Court found (392 F. Supp. at 265, fn. 2; JA 40), the parties had stipulated that Amin Jute Mills, Ltd. is incorporated under the law of Pakistan; a large majority of its shares is held in Pakistan; at least seven of its nine directors are citizens and residents of Pakistan, and only one of Bangladesh; all of its business and affairs (save the portion in Bangladesh at the time of the nationalizing acts) is under the control of its directors in Pakistan (JA 47-48).

(3) The goods in issue had departed East Pakistan, arrived in New York and been sold and resold well before the Bangladesh nationalizing acts. The debt owed by their purchaser, Cosmic, was owed to Irving as agent, in New York.

(4) The cases cited (Br 33-34) deal with the scope of voluntary assignments for consideration, and have nothing to do with the extent of governmental confiscations.

The argument that Bangladesh courts might act upon the "successor" interests its government has appointed does not affect the location of actual property and debts, nor the recognized applicable law.

(d) "*The classic description of the act of state doctrine ought to be amended*"

The Bangladesh plaintiffs contend that this Court ought to amend the act of state doctrine to provide that "...

our courts will not sit in judgment of the taking . . . of any intangible property by a foreign state where that foreign state has a reasonable relationship to that taking." (Br 36.) They urge that ". . . a reasonable relationship to the taking involving a debt would be when the taking state has the creditor before it." (Br 36.)

It is not within this Court's province to alter the act of state doctrine, frequently enunciated and consistently applied by the Supreme Court for nearly eighty years.

Furthermore, recognizing a "taking" involving a debt "when the taking state has the creditor before it" would not benefit the Bangladesh plaintiffs. Here the only possible creditors with respect to Cosmic's debt are Irving (thus the debt would be located in New York) and United Bank Limited (thus the debt would be located in Pakistan).

II.

The District Court correctly decided that the enforceability of the Bangladesh expropriation decrees with respect to property interests located within the United States is a question of United States law.

The Bangladesh plaintiffs claim that United Bank Limited has "opted for a choice of American law" (Br 46). However, as the District Court held, where the issue is whether a foreign government's expropriation decree is effective as to property located within the United States at the time of the attempted expropriation, the only law that our courts may apply is United States law:

"When property is located in the United States, the only law that can be applied with any certainty, and the law the Supreme Court has directed must

be applied, is our own. To hold otherwise would, as held in *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527, 545 (1972):

“ ‘extend the act of state doctrine to unprecedented lengths. It would render nugatory the sound principle that our courts will not give extra-territorial effect to a confiscatory decree of a foreign state and thereby emasculate the public policy of the forum against confiscation.’ ” 392 F. Supp. at 269; JA 37.

The District Court's decision is in accord with this Court's holding in *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966):

“Extra-territorial enforcement of [a foreign expropriation decree] as to property within the United States at the date of its promulgation turns on whether the decree is consistent with our policy and laws.” (Footnote omitted.)

In the course of their argument against application of American law, the Bangladesh plaintiffs make assertions which merit brief response:

1. “the banks in [East Pakistan] operated under a system by which each branch office had its own assets and liabilities” (Br 46)

“[upon the emergence of Bangladesh], each bank then severed was entitled to its own assets as maintained on the books of the branches, and was obligated to its own liabilities” (Br 47)

This view of the nature of branch banking in East Pakistan disregards the testimony that the "separate" nature of the branch assets was for the purpose of internal accounting as a measure of profitability among the branches (JA 385, 392), and that all branch profits and losses were consolidated into the balance sheet of United Bank Limited as a whole (JA 304, 386). The District Court firmly and properly rejected the Bangladesh plaintiffs' contention that United Bank Limited's former East Pakistan branches had a corporate existence independent of that of United Bank Limited, and found the testimony they proffered in support to be totally unworthy of belief (392 F. Supp. at 268; JA 35).

2. "[United Bank Limited claims it is] entitled to the assets acquired from the jute [mill] in question, while disdaining any obligation to repay [its] former [branch] for the advances made by [the] former [branch] to [this] very jute [mill.]" (Br 47)

This assertion is rebutted by trial exhibit U-14 which shows the branch bank was indebted to, rather than a creditor of, its parent organization. The total advances made by the particular branch were much greater than its total deposits, and the difference came from Karachi (Pakistan) (JA 383-84). Thus the Bangladesh plaintiffs have it backwards.

That there is no "disdain" for the obligations entered into by the former branches is demonstrated by the fact that United Bank Limited is honoring the obligations to parties outside Bangladesh which were entered into by its East Pakistan branches (JA 384).

III.

The District Court correctly decided that United States public policy precludes recognition of the Bangladesh expropriation decrees, and that therefore United Bank Limited is entitled to the proceeds of the seven Trust Receipts.

It is well settled that both federal and New York state courts will refuse to recognize a law which violates domestic public policy considerations. *Menendez v. Saks & Co.*, *supra*, 485 F.2d at 1364; *Republic of Iraq v. First National City Bank*, *supra*, 353 F.2d at 51; *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 537, 110 N.E.2d 9 (1953); *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N.Y. 369, 378, 189 N.E. 456 (1934); *Gonzalez v. Industrial Bank (of Cuba)*, 12 N.Y.2d 33, 39, 186 N.E.2d 410, 234 N.Y.S.2d 210 (*per curiam* 1962).

As noted above, enforcement by United States courts of a foreign expropriation decree as to property within the United States at the date the decree was promulgated turns on whether the decree is consistent with our policy and laws. *Republic of Iraq v. First National City Bank*, *supra*, 353 F.2d at 51.

The arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees is not consistent with our domestic public policy. *Vladikavkazsky Ry. Co. v. New York Trust Co.*, *supra*, 263 N.Y. at 378. Similarly, a taking without a hearing and without compensation is contrary to our public policy. *Plesch v. Banque Nationale de la Republique d'Haiti*, 273 App. Div. 224, 227-28, 77 N.Y.S.2d 43 (1st Dept.), *aff'd per curiam*, 298 N.Y. 573, 81 N.E.2d 106 (1948).

One basic notion of our domestic public policy is embodied in the Fifth Amendment to the Constitution:

"... nor shall private property be taken for public use without just compensation." U.S. Const. amend. V; *Republic of Iraq v. First National City Bank*, *supra*, 353 F.2d at 52; *Maltina Corp. v. Cawy Bottling Co.*, *supra*, 462 F.2d at 1027.

Title 22, Section 2370(e)(1) of the United States Code which prescribes the conditions under which the President of the United States must suspend foreign assistance to countries which have nationalized property owned by United States citizens gives a concrete standard of "just compensation". It sets a standard of "... speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof. . . ." 22 U.S.C. § 2370(e)(1) (1970). The *Restatement (Second) Foreign Relations Law of the United States* in Sections 187-190 expresses similar criteria. Just compensation must be (a) "adequate in amount", defined as "equivalent to the full value of the property taken, together with interest to the date of payment," (b) "paid with reasonable promptness", defined to be "as soon as is reasonable under the circumstances in light of international standards of justice", and (c) "paid in a form that is effectively realizable by the alien, to the fullest extent that circumstances permit" which is defined as "in the form of cash or property readily convertible into cash." *Restatement (Second) Foreign Relations Law of the United States* §§ 187-190 (1965).

Measured against this standard, it is clear that the Bangladesh decrees fail in all particulars to be "just compensation". The Banks Nationalisation and Industrial Na-

tionalisation Orders do promise compensation, but the promise of compensation is subject to qualifications which render it meaningless. *First*, the orders do not provide for payment of full value. Compensation is limited to the paid up value of the shares, failing to compensate for any appreciation in value from the initial subscription price. No provision is made for the payment of interest from the date of taking. *Second*, the passage of over three years has eliminated any possibility of payment with reasonable promptness. *Third*, the form of payment has not been specified and it does not appear that payment will be made (if ever) in cash or a form readily convertible to cash. *Fourth*, under the discretion reserved to it by the orders, the Bangladesh government may make payments in an arbitrary or discriminatory manner. *Finally*, the property of United Bank Limited and Amin Jute Mills, Ltd. in Bangladesh was actually confiscated under the Abandoned Property Order which makes no provision whatsoever for payment of compensation.

A second basic aspect of federal public policy is contained in a second part of the Fifth Amendment, the Due Process Clause:

“ . . . nor shall any person . . . be deprived of . . . property without due process of law . . . ” U.S. Const. amend. V.

In *Republic of Iraq v. First National City Bank*, *supra*, 353 F.2d at 52, this clause was found to be an independent basis for denying effect to Iraqi decrees purporting to seize the New York bank accounts of the former King of Iraq. No serious argument could be made that a summary decree confiscating title to property without a hearing, like the Bangladesh orders here, is consistent with domestic notions of due process.

A third basis on which the Bangladesh orders violate domestic public policy is suggested by the opinion in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964), where this Court raised the following question:

"Is it a violation of international law for a country to fail to pay adequate compensation for the property it seizes from a *particular class of aliens*, when the purpose for the seizure of the property is to retaliate against the homeland of those aliens and when the result of such seizure is to discriminate against them only." (emphasis in original) 307 F.2d at 864.

This Court answered the question affirmatively. The Supreme Court in *Sabbatino* rejected the international law rationale of the lower court, but this question—recast in terms of public policy derived from the Equal Protection Clause of the Fifth Amendment—suggests another standard which foreign decrees must meet to be given effect in the courts of the United States. This standard highlights a particular aspect in which the Bangladesh orders contravene American principles. Like the Cuban decree at issue in *Sabbatino*, which confiscated the property of American corporations doing business in Cuba in retaliation for the action of the American Congress in decreasing the import quota for Cuban sugar, the Bangladesh orders are political acts designed to punish a particular country's foreign policies by seizing the property of that country's nationals. It is immaterial that these orders are aimed at aliens, rather than United States citizens. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, *supra*.

The Bangladesh plaintiffs argue that the Bangladesh expropriation decrees are consistent with United States

public policy and therefore should be enforced by this Court (Br 48) citing cases in which the Supreme Court gave effect to laws enacted by the United States Congress pursuant to the war powers conferred upon it by Constitution, Art. I, Section 8, seizing assets of enemy aliens. Our public policy to take all necessary measures to combat those with whom we are at war does not mean that our courts must give effect to decrees of foreign governments who attempt to expropriate the property in the United States of citizens of friendly countries.

One final point. The Bangladesh plaintiffs state that the government of Pakistan has "expressly rejected" the notion of due process (Br 49). That is simply not true. The relevant portion of the Pakistan constitution (JA 56-7) provides (in strong contrast to the Bangladesh constitution: JA 56) that compensation must be provided for property taken for a public purpose. The adequacy of the compensation is left to be determined by the legislature, but the legislature must provide compensation. Thus this assertion is as hollow as their final one: that payment is being sought for the toil of Bengali workers. The workers have been paid with funds advanced by the bank in Pakistan, which is now entitled to the proceeds of the sale.

CONCLUSION

This court should affirm the District Court's award of the proceeds of the Trust Receipts to United Bank Limited.

Dated: New York, New York
August 7 1975

Respectfully submitted

CARTER, LEDYARD & MILBURN
Attorneys for Plaintiff-Appellee
UNITED BANK LIMITED

LOUIS L. STANTON, JR.
CHESTER J. WROBLESKI
of Counsel

RECEIVED 2 copies
SILVERMAN
UNCLERK & LORD
Aug 7 11 01 AM '75

2 COPY RECEIVED

Aug 7, 1975
NIERENBERG, ZILF & WEINSTEIN

Attorneys for appellants

COPY RECEIVED (2)

OLWINE, CONNELLY, CHASE, O'DONNELL & WERTER

Attorneys for Defendants-Appellees

Date 8/7/75 11:45 A.M. JB